

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ANTHONY PEREZ,

Petitioner,

vs.

B. CURRY, Warden, and BOARD OF
PRISON TERMS,Respondents.
_____ /

No. C 06-5437 PJH (PR)

**ORDER GRANTING
CERTIFICATE OF
APPEALABILITY**

This is a habeas case under 28 U.S.C. § 2254 filed pro se by a state prisoner. The petition was directed to a denial of parole on April 27, 2005. The court denied the petition in an order entered on December 8, 2008. Petitioner filed a timely notice of appeal.

At the time petitioner filed his notice of appeal, petitioners whose challenges to a parole denial had been rejected did not have to obtain a certificate of appealability ("COA") in order to appeal. See *Rosas v. Nielsen*, 428 F.3d 1229, 1232 (9th Cir. 2005). *Rosas* was overruled as to this point in *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc), so a COA is now necessary. See *id.* at 552-55. The court of appeals has remanded the case for the court to determine whether a COA should issue.

A judge shall grant a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate must indicate which issues satisfy this standard. See *id.* § 2253(c)(3). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000).

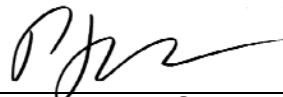
Petitioner's claims were that: (1) The Board's denial of parole violated his due process rights because it was the seventh denial based on the circumstances of the offense and because the denial was not supported by "some evidence" that he would be a danger to society if released; and (2) the denial violated his plea agreement.

A COA will be issued as to the "some evidence" portion of claim one because the facts upon which the denial was based were nearly twenty years old, and reasonable jurists might find it debatable whether such old facts constituted "some evidence" of present dangerousness. A COA is denied as to the plea bargain issue and the "*Biggs* claim" issue for the reasons set out in the order denying the petition.

The certificate of appealability is **GRANTED** as described above. The clerk shall transmit the record and a copy of this order to the Court of Appeals.

IT IS SO ORDERED.

Dated: July 12, 2010.



PHYLLIS J. HAMILTON
United States District Judge